No. 98-83

In The

Supreme Court of the United States

October Term, 1998

CHARLES WILSON, GERALDINE WILSON and RACHEL SNOWDEN, next friend/mother of VALENCIA SNOWDEN, a minor,

Petitioners,

vs.

HARRY LAYNE, JAMES A. OLIVO, JOSEPH L. PERKINS, MARK A. COLLINS, ERIC E. RUNION and BRIAN E. ROYNESTAD,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR PETITIONER

Of Counsel:

STEVEN R. SHAPIRO
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500

ARTHUR B. SPITZER
American Civil Liberties Union of the National Capital Area
1400 20th Street, N.W.
Washington, D.C. 20036
(202) 457-0800

DWIGHT H. SULLIVAN
American Civil Liberties Union of Maryland
2219 St. Paul Street
Baltimore, MD 21218
(410) 889-8555

RICHARD K. WILLARD
Counsel of Record
DAVID H. COBURN
JAMES S. FELT
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000

RICHARD SELIGMAN
601 Indiana Avenue
Suite 910
Washington, D.C. 20004
(202) 745-7800

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

58pp

QUESTIONS PRESENTED

1. Whether law enforcement officers violate the Fourth Amendment by allowing members of the news media to accompany them and to observe and record their execution of a warrant?

2. Whether, if this action violates the Fourth Amendment, the officers are nonetheless entitled to the defense of qualified immunity?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATUTES

RULES

CONSTITUTION

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The *en banc* opinion of the United States Court of Appeals for the Fourth Circuit is reported at 141 F.3d 111. The panel opinion is reported at 110 F.3d 1071. The district court's oral opinion is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 8, 1998. The petition for a writ of certiorari was filed on July 7, 1998, and granted on November 9, 1998. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

STATEMENT OF THE CASE

A. Statement of Facts

In early 1992, the United States Marshals Service instituted "Operation Gunsmoke," a nationwide fugitive

apprehension program conducted with the cooperation of various state, county, and municipal law enforcement agencies. The Montgomery County (Md.) Sheriff's Office participated in the program pursuant to a Memorandum of Understanding executed by Sheriff Raymond Kight dated February 12, 1992. *See* Joint Appendix ("J.A.") 15-20. The memorandum provided: "It is agreed that no mention will be made to the press about 'Operation Gunsmoke' until a joint press statement can be prepared at the culmination of the operation." J.A. 20.

Notwithstanding this specific prohibition, respondent deputy U.S. Marshal Harry Layne, the Washington, D.C. area site supervisor of "Operation Gunsmoke," assigned a male reporter and female photographer from the *Washington Post* to the "Operation Gunsmoke" team that raided petitioners' home on April 16, 1992. Court of Appeals Joint Appendix ("C.A.J.A.") 129. The team consisted of respondents deputy marshals Joseph Perkins and James Olivo and Montgomery County Sheriff's Office deputies Eric Runion and Mark Collins. Appendix to Petition for Writ of Certiorari ("Pet. App.") 4a.

The team drove the reporters around with them for approximately two weeks. Pet. App. 4a. The reporters were, according to Perkins, "welcome to do what the press does." C.A.J.A. 129 (Perkins Depo. at 49). They were instructed by the officers "where to place themselves and what to do for their safety," but no limitations were placed on what "he [the reporter] was writing or recording or what she [the photographer] was photographing." C.A.J.A. 83 (Olivo Aff. at 6).

On April 14, 1992, the Circuit Court for Montgomery County, Maryland issued three bench warrants for the arrest of Dominic Jerome Wilson based upon charges of violation of probation. The warrants permitted "any duly authorized peace officer" to arrest Dominic Jerome Wilson. No mention of media personnel was made in the warrants. *See* J.A. 34-39.

On the morning of April 16, 1992, respondents drove the reporters to the home of petitioners Charles and Geraldine Wilson believing that Dominic Jerome Wilson, petitioners' 27 year-old son, lived there. Pet. App. 68a. He did not, in fact, live there. C.A.J.A. 94.

At approximately 6:45 a.m., respondents Perkins, Olivo, and Collins led the reporter and photographer to the front door of the Wilson home. Runion covered the back door with respondent Roynestad, who was not normally part of the "Operation Gunsmoke" team, but was assisting them that morning. Pet. App. 68a-69a.

Charles and Geraldine Wilson were lying in bed when they heard loud knocking on their front door. Their nine year-old granddaughter, Valencia Snowden, had just been dropped off by her mother to wait for her school bus and was also in the house. Pet. App. 68a-69a; C.A.J.A. 84-85, 96.

The Wilsons heard Valencia going to the front door and called out to her to see what was going on. She did not respond and the knocking continued. Concerned, Mr. Wilson got out of bed to investigate. C.A.J.A. 97.

When Mr. Wilson reached his living room he was confronted by Perkins, Olivo, and Collins, who were

standing in his living room with their guns drawn. The reporters were with them. They were all dressed in plain clothes and did not identify themselves as law enforcement officials. Pet. App. 5a, 21a, 69a; C.A.J.A. 92-93, 100-103.

Mr. Wilson raised his hands in the air and was ordered in foul and abusive language to get down on the floor. His wife entered the living room as he was complying with this order. The officers questioned the Wilsons concerning the whereabouts of Dominic, the Wilsons' adult son. Mr. Wilson told the officers that he was not Dominic, that Dominic did not live there, and that he had not seen Dominic for at least two weeks. Mrs. Wilson identified Mr. Wilson as her husband, "Charlie Wilson," and confirmed that Dominic was not there. Pet. App. 69a-70a; C.A.J.A. 87-89.

Just prior to entering the house, the officers and media personnel reviewed an arrest worksheet and photographs of Dominic Wilson that showed him to be 27 years old, 185 pounds, and clean-shaven. On April 16, 1992, Mr. Wilson was 47 years old, weighed 220 pounds and had a beard that was almost completely white. Pet. App. 64a.

Perkins cursed at and threatened to arrest Mr. Wilson if Dominic were found in the house. He then searched the home while Collins opened the back door of the house to let in deputy sheriffs Runion and Roynestad. Nobody else was in the house. Pet. App. 5a, 69a; C.A.J.A. 101, 102-03.

The reporter and photographer remained in and participated in the search of the Wilson home without the consent of the Wilsons. As the district court found, the

reporter and photographer "were in the house, snooping around, looking around, participating in one fashion or another with both the search of the premises for the individual, who was not found, and the seizure of the Wilsons, who were detained and actually photographed by the photographer." Pet. App. 77a. Mr. Wilson was wearing underpants and Mrs. Wilson was wearing a sheer nightgown throughout the encounter, including while they were being photographed. The photographer also took photographs of Mr. Wilson being forcibly detained, belly-down on his living room floor with Olivo's knee in his back and gun to his head. At no time were the Wilsons permitted to cover themselves decently. Pet. App. 4a-5a; 21a-22a, 63a-64a, 69a, 70a; C.A.J.A. 91, 106.

Respondents were never told that they could or should take the media with them into private homes and were aware of no authority that permitted them to do so. C.A.J.A. 131-32. It also is admitted that the press were not present in the Wilson home on April 16, 1992 to assist in the accomplishment of any law enforcement purpose:

> Q. Well, the press – on April 16, 1992, they were not assisting you as law enforcement officers in any way, were they?
>
> A. No.

C.A.J.A. 119 (Collins Depo. at 157).

After the officers and reporters left the house, the Wilsons were able to locate Dominic at his girlfriend's apartment. They instructed him to walk to a nearby police station to turn himself in, which he promptly did. C.A.J.A. 81.

B. Procedural History

The Wilsons brought a *Bivens* action in the District Court of Maryland alleging, among other things, that respondents' police-led media invasion of their home violated their Fourth Amendment right to be secure there against unreasonable searches and seizures.[1]

Respondents moved for summary judgment on qualified immunity grounds. The district court denied the motion, relying primarily on *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995), and *Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995). The district court found that the police-led media intrusion in this case violated well-established Fourth Amendment principles and that a reasonable officer would have known that bringing the media into a private dwelling without consent was unlawful. The district court further determined

[1] The Wilsons also asserted claims under 42 U.S.C. § 1983. Those claims were dismissed by the district court because respondents were found to be acting under color of federal law, not state law. The district court also granted respondents' motion for summary judgment on the Wilsons' *Bivens* claims that respondents (1) lacked probable cause to enter their home and (2) used excessive force. The Wilsons moved for entry of final judgment as to those claims under Federal Rule of Civil Procedure 54(b) so that they could appeal all of the district court's rulings together with respondents' appeal of the denial of qualified immunity. The motion was opposed by respondents and denied by the district court. Accordingly, all of these issues remain before the district court along with the Wilsons' trespass and invasion of privacy claims against the United States under the Federal Tort Claims Act. Pursuant to that Act, the United States was substituted for respondents as defendant as to the Wilsons' common law claims.

that the media participation in the search of the Wilson home served no legitimate law enforcement purpose. *See* Pet. App. 66a-78a.

Respondents brought an interlocutory appeal. In a 2 to 1 decision, a panel of the Court of Appeals reversed the district court. The majority found that a reasonable officer would not necessarily have understood that bringing the media into a private dwelling to observe the execution of a warrant violated any clearly established right. *See* Pet. App. 51a-65a.

Petitioners filed a timely petition for rehearing and suggestion for rehearing *en banc*, which was granted. Oral argument was held before the *en banc*-court on September 30, 1997. Judge Donald Russell, the dissenting judge on the original panel, subsequently died. The case was argued *en banc* a second time on March 3, 1998. The final vote of the court was 6 to 5 to reverse the district court. *See* Pet. App. 1a-50a.

The majority defined the specific right alleged to be violated as the Wilsons'

> Fourth Amendment right to avoid unreasonable searches and seizures resulting from the officers' decision to permit members of the media who were not authorized to execute the warrant to enter into a private residence, without the homeowners' consent, to observe and photograph the execution of an arrest warrant.

Pet. App. 8a. The question before the court, then, was "whether in April 1992 this right was clearly established and whether a reasonable officer would have understood that the conduct at issue violated it." *Id.* The Court did

not address whether the underlying conduct violated the Wilson's Fourth Amendment rights.

The majority's analysis began with the observation that the reporters did nothing that the officers themselves could not have done consistent with the terms of the arrest warrant. The Fourth Circuit then concluded that

> reasonable officers under these circumstances had no clearly established law from the Supreme Court, this court, or the Court of Appeals of Maryland from which they necessarily understood that they exceeded the scope of an arrest warrant by permitting reporters to engage in activities in which they themselves could have engaged consistent with the warrant.

Pet. App. 9a-10a.

Further, the majority found,

> even if we were to agree with the Wilsons that in 1992 it was clearly established that the Fourth Amendment was violated if officers permitted third parties who were not expressly authorized by the warrant and who were not assisting reasonable law enforcement efforts related to the execution of the warrant to accompany them into a residence, we could not conclude that it was clearly established that the conduct in which these officers engaged manifestly fell within the ambit of that rule.

Pet. App. 10a. According to the majority, a reasonable law enforcement officer could have believed that having the media along served a legitimate law enforcement purpose related to the execution of the warrant. A five-member plurality of the Court hypothesized that, for example,

having the media present might afford protection by reducing the chance that a target of a warrant will resist arrest in the face of recorded evidence of his actions, or improve public oversight and thus deter crime and improper police conduct. Pet. App. 10a.[2]

Judge Murnaghan wrote a dissenting opinion in which four other members of the Court joined. The dissenters found that it has long been established that the permissible actions of a police officer executing a warrant are limited to those strictly within the bounds set by the warrant or reasonably necessary to achieving its execution. The dissenters concluded that since no reasonable officer could have believed that allowing reporters into the home or allowing them to take pictures was either authorized by the arrest warrant or reasonably necessary to accomplish its legitimate law enforcement objective, respondents were not entitled to qualified immunity.

SUMMARY OF ARGUMENT

This Court has repeatedly held that the privacy of the home is entitled to special protection under the Fourth Amendment. Respondents' decision to invite the media into petitioners' home, while acknowledging that the

[2] Judge Widener did not join the portion of the majority opinion providing these examples of what the plurality viewed as legitimate law enforcement purposes in furtherance of the execution of the warrant that a reasonable officer could have believed were served by the media's presence. *See* Pet. App. 17a (Widener, J., concurring). Thus, only five of the eleven judges joined this part of the opinion.

presence of the media was unrelated to any legitimate law enforcement purpose, violates this core constitutional principle.

The existence of a warrant is not a *carte blanche* for law enforcement officials to do whatever they want. Indeed, as this Court has noted, the Fourth Amendment was adopted largely in response to the British practice of general warrants. Thus, the Fourth Amendment provides that the warrant itself must state with "particularity" the places and things to be searched. More importantly for this case, the warrant provides only a limited privilege for those whose entry into the home is necessary to accomplish the purposes of the warrant.

This Court has often looked to the common law as a guide in interpreting the Fourth Amendment. Here, there is no doubt that respondents' actions would have been considered unlawful at common law, which regarded every unauthorized intrusion into the home as a trespass. Respondents have not and cannot point to any common law tradition that even remotely authorizes their actions in this case.

To the contrary, the common law treated the home as a castle and a sanctuary from prying eyes. In defining the privacy interest that underlies the Fourth Amendment, many of the English cases later relied on by the framers of the Fourth Amendment therefore focused on protecting one's private affairs from public disclosure. *See, e.g., Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763). That concept of privacy is simply irreconcilable with the notion that law enforcement officials may bring the media along to

record and report what transpires inside a home whenever a warrant is executed.

Because of the unique position occupied by the home, this Court has consistently applied the accepted rule that a government intrusion not authorized by a warrant is presumptively unreasonable. The news media search in this case was clearly not authorized by a warrant. By respondents' own admission, it is equally clear that the media were not present in the Wilson home to assist in accomplishing the arrest.

Any *post hoc* speculation that bringing the media inside a home may serve a legitimate law enforcement interest is irrelevant and unpersuasive. The argument that accurate reporting leads to deterrence of crime, for example, could justify the media's presence at any government activity, no matter how intrusive. In addition, it would logically allow the police to bring anyone and everyone with them into a private home.

The Fourth Circuit's qualified immunity standard was overly generous to respondents. Under *Anderson v. Creighton*, 483 U.S. 635 (1987), the unlawfulness of respondents' conduct need only be apparent in light of preexisting law. The Fourth Circuit's standard in effect required the Wilsons to point to a factually indistinguishable case in order to overcome the qualified immunity hurdle.

If the Fourth Circuit had analyzed the constitutional issue, it would have realized that fundamental principles apply with obvious clarity to respondents' conduct. From

the early days of the common law to the present a government official authorized to intrude into a private residence was only authorized to take actions reasonably related to accomplishing the purpose that justified his intrusion.

On the facts of this case, moreover, the unlawfulness of respondents' conduct is made even more apparent by the humiliating circumstances under which the Wilsons were observed and photographed.

ARGUMENT

I. RESPONDENTS VIOLATED THE FOURTH AMENDMENT BY BRINGING THE NEWS MEDIA INTO THE WILSON HOME

The home more than any other place provides the individual a sanctuary from which the public eye can be excluded except under the most compelling justifications and safeguards. This is not only because, as a historical matter, "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed," *United States v. United States District Court*, 407 U.S. 297, 313 (1972), but also because "[a]t the very core of [personal privacy] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961). It is for this reason that "over the years the Court consistently has been most protective of the privacy of the dwelling," *Wyman v. James*, 400 U.S. 309, 316 (1971), and has afforded "the sanctity of private dwellings . . . the most stringent Fourth Amendment

protection." *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976). It is for this reason that the Court has declared that in no other setting is "the zone of privacy more clearly defined than when bounded by the physical dimensions of an individual's home – a zone that finds its roots in clear and specific constitutional terms: 'The right of the people to be secure in their . . . houses . . . shall not be violated.' " *Payton v. New York*, 445 U.S. 573, 589-90 (1980).

On April 16, 1992, as the Wilsons lay in bed, respondents brought members of the news media into their home to observe and record what, at 6:45 in the morning, was bound to be, and turned out to be, a humiliating encounter. The media were not brought inside to help respondents apprehend Dominic Jerome Wilson – the reason respondents themselves were entitled to be there. As the district court found, the media's presence bore no relationship at all to accomplishing the lawful purpose that justified any intrusion on the Wilsons' privacy and property rights. By inviting the media into the Wilson home, respondents therefore violated a very basic and easy-to-understand right that has been established for centuries – the right to keep strangers out of our houses who have no business being there. Indeed, there are very few rights that are more clearly established in our constitutional tradition.

A. The Framers Regarded Any Intrusion Into The Home As Unlawful Unless Specifically Authorized

That an individual has the right to bar any and all strangers from his home who are not authorized by law to enter is a principle older than the common law itself.[3] In *Entick v. Carrington*, 19 How. St. Tr. 1029 (K.B. 1765), a case this Court has called a "monument of English freedom" "undoubtedly familiar" to "every American statesman" at the time the Constitution was adopted,[4] Lord Camden declared that "every invasion of private property, be it ever so minute, is a trespass" for which the trespasser is liable "though the damage be nothing." *Id.* at 1066. In order to escape this liability, the trespasser bore the burden of proving "by way of justification, that some positive law has justified or excused him." *Id.* If the law recognized no justification, "the silence of the books [was] an authority against the defendant, and the plaintiff must have judgment." *Id.*

The "silence of the books" establishes respondents' liability in this case. The utter lack of authority to bring strangers into petitioners' home simply to watch what

---

[3] *See* Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 13-18 (Da Capo Press 1970) (1937) (tracing the "immunity that the law has thrown around the dwelling house of man" to biblical and Roman times); John Kaplan, *Search and Seizure: A No Man's Land in the Criminal Law*, 49 Cal. L. Rev. 474, 475 (1961) (recounting that at early common law any unconsented entry onto the land of another was a trespass).

[4] *Boyd v. United States*, 116 U.S. 616, 626 (1886).

happened would have made respondents liable at common law as joint trespassers. The utter lack of authority under a warrant to do so makes them liable as violators of the Fourth Amendment.

The common law at the time of the Fourth Amendment's adoption serves as a baseline for the Fourth Amendment's protection of the home. In *Payton v. New York*, for example, this Court refused to "disregard the overriding respect for the sanctity of the home that has embedded in our traditions since the origins of the Republic" in finding a warrantless felony arrest inside the home unconstitutional. 445 U.S. at 601. Similarly, finding a warrantless search for a fugitive in the home of a third party unconstitutional in *Steagald v. United States*, 451 U.S. 204 (1981), this Court recognized that "the history of the Fourth Amendment strongly suggests that its Framers would not have sanctioned" such a search. 451 U.S. at 220.

A law enforcement official, of course, was privileged to enter a home to effectuate an arrest at common law. *See, e.g.*, 3 William Blackstone, *Commentaries on the Laws of England* 212 (1768). But we are aware of no authority at common law that would have permitted him to invite in an audience simply to watch him in action.

Contemporary courts applying common law principles have reached the same conclusion. In *Anderson v. WROC-TV*, 441 N.Y.S.2d 220, 223 (Sup. Ct. 1981), for example, the court found that "[a]lthough otherwise trespassory conduct may be legalized or justified by lawful authority, such as an officer of the law acting in the performance of his duty, such authority does not extend

by invitation, absent an emergency, to every and any other member of the public, including members of the news media." Similarly, *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. 1980) found that a police officer may be liable for trespass for telling a television cameraman that he could "come forward when the situation was under control." 295 N.W.2d at 782. The court concluded that "Lieutenant Kuenning had no authority to extend a consent to [a television cameraman] to enter the land of another." *Id.; see also Green Valley School, Inc. v. Cowles Florida Broadcasting, Inc.*, 327 So.2d 810, 819 (Fla. Dist. Ct. App. 1976) ("A law enforcement officer is not as a matter of law endowed with the right or authority to invite people of his choosing to invade private property and participate in a midnight raid of the premises").[5]

At common law the media personnel who entered the Wilson home would have been trespassers, and respondents themselves would have been trespassers for having brought them there. *See, e.g.*, W. Page Keeton *et al.*, *Prosser and Keeton on Torts*, § 13, at 72 (5th ed. 1984) (One is liable for trespass not only for entering upon land, but also "by causing a third person to enter"); *accord* Restatement (Second) of Torts § 158 cmt. j (1965) (If an "actor has commanded or requested a third person to enter land in

---

[5] *Compare Florida Publishing Co. v. Fletcher*, 340 So.2d 914 (Fla. 1976) (finding constructive consent of homeowner, based upon "custom and usage," to allow media to enter home with fire officials who requested assistance of photographer).

the possession of another, the actor is responsible for the third person's entry if it be a trespass").[6]

In addition, the privilege one possessed at common law to enter the land of another, served only to protect actions taken in furtherance of the purpose for which the privilege was given. *See* Restatement (Second) of Torts ch. 8, at 308 note (privilege to enter land protects those actions "reasonably necessary to the accomplishment of [its] purpose"). Similarly, with respect to warrants, although "a lawful warrant will at all events indemnify the officer, who executes the same ministerially," 4 William Blackstone, *Commentaries on the Laws of England* 288 (1769), in cases where he "makes an ill use of the authority with which the law entrusts him, he shall be accounted a trespasser *ab initio*." 3 Blackstone at 213.

---

[6] *See also, e.g., Daingerfield v. Thompson*, 74 Va. 136, 151 (1880) ("There seems, indeed, to be no principle of law better settled, and for which numerous authorities may be cited if necessary, than this: that all persons who wrongfully contribute in any manner to the commission of a trespass, are responsible as principals, and each one is liable to the extent of the injury done."); *Brown v. Perkins*, 83 Mass. (1 Allen) 89, 96-98 (1861) (holding that "aider and abetter" is liable as principal for trespass); *Thompson-Houston Electric Co. v. Ohio Brass Works*, 80 Fed. 712, 721 (6th Cir. 1897) (recognizing that "[f]rom the earliest times, all who take part in a trespass, whether by actual participation therein, or by aiding and abetting it, have been jointly and severally liable for the injury inflicted") 2 Hillard, *Law of Torts* 243 (4th ed. 1874) ("a person who is present at the commission of a trespass, encouraging or exciting the same by words, gestures, looks, or signs, or who in any way or by any means countenances and approves the same, is in law deemed to be an aider and abettor, and liable as principal").

Because of the immunity warrants provided to those who executed them "ministerially," the Framers sought to limit them. *See generally* Akhil Reed Amar, *The Constitution and Criminal Procedure: First Principles* 10-17 (1997). Hence, the warrant clause of the Fourth Amendment provides that *no* warrants shall issue unless certain strict standards are met – *i.e.*, probable cause, oath or affirmation, and particularity. In 1859, the Massachusetts Supreme Judicial Court proclaimed that the Massachusetts counterpart to the Fourth Amendment was designed "strictly and carefully to limit, restrain and regulate" warrants. *Robinson v. Richardson*, 79 Mass. (13 Gray) 454, 457 (1859). Judge Thomas Cooley's 1868 treatise on constitutional law states that "the rules of law which pertain to [search warrants] are of more than ordinary strictness." Thomas Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 303 (1st ed. 1868).

The search warrant process was long ago seen as "distressing to the citizen" because of its "humiliating and degrading effects." *Reed v. Rice*, 25 Ky. (2 J.J. Marsh.) 44, 46 (1829). Thus, an official executing a warrant was entitled to immunity only so long as he strictly complied with the warrant. "[I]f the officer serving the warrant exceeded his authority," he "would be responsible for the wrong done." *Commonwealth v. Dana*, 43 Mass. (2 Met.) 329, 337 (1841).

The warrant that respondents possessed in this case only carried with it the implicit authority to enter the home of Dominic Wilson to effectuate his arrest. *See Payton*, 445 U.S. at 602-03 ("an arrest warrant founded upon probable cause implicitly carries with it the limited

authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.") The media personnel brought into his parents' home were not brought there to assist in that arrest. Because the media's presence bore no relationship to accomplishing the purpose that entitled respondents to be in the Wilson home, respondents would have been liable for trespass at common law for having exceeded the scope of their authority under the warrant.

B. The Framers Were Concerned About Public Disclosure Of Private Information, Which Is A Particular Risk Of Media Intrusion

We seriously doubt, moreover, that the fiercely proud citizens who adopted the Fourth Amendment would have allowed government officials to bring strangers into their houses for the sole purpose of broadcasting to the general public what they observed there. The common law respect for property rights that made "every invasion of private property, be it ever so minute" a trespass encapsulated a still deeper respect for the security of the home and the privacy one enjoys there. The famous language of *Semayne's Case* that "the house of every one is to him as his castle and fortress, as well as for his defense against injury and violence, as for his repose," *Semayne v. Gresham*, 5 Co. Rep. 91a, 92b, 77 Eng. Rep. 194, 195 (K.B. 1604), was echoed by James Otis, Jr., in his opposition before the Superior Court of Massachusetts to the renewal of the writs of assistance that expired after the death of George II:

> Now one of the most essential branches of English liberty, is the freedom of one's house. A man's house is his castle; and while he is quiet, he is as well guarded as a prince in his castle.

2 *Legal Papers of John Adams* 142 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

That houses were castles was a recurrent theme of the commentators on the Constitution in 1787-88, before the Bill of Rights was proposed to the states. The commentators feared the consequences if a right against unreasonable searches and seizures was not included in a Bill of Rights to the Constitution. The Anti-Federalist, "Cato Uticensis," warned, "you subject yourselves to see the doors or your houses, them [sic] impenetrable castles, fly open."[7] Another prominent Anti-Federalist, "Maryland Farmer," called a house "the asylum of a citizen" and "the sanctuary of a freeman."[8] A Federalist newspaper essay, the "Remarks" of "a Foreign Spectator," declared, "If English law holds the dwelling of Wilkes sacred, the federal constitution will equally consecrate yours from violation."[9] The Antifederalists of the Maryland ratifying convention feared that a federal excise

---

[7] *Cato Uticensis*, Virginia Independent Chronicle, Oct. 17, 1787, at 1, *reprinted in* 8 *The Documentary History of the Ratification of the Constitution* 75 (Merrill Jensen ed., 1976).

[8] *Essays By a Farmer (I), reprinted in* 5 *The Complete Anti-Federalist* 5 (Herbert J. Storing ed., 1981).

[9] *Remarks on the Amendments to the Federal Constitution . . . by a Foreign Spectator*, The Fed. Gaz. and Philadelphia Evening Post, Oct. 31, 1788, at 3, *quoted in* William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* 1379 (1990) (Ph.D. Dissertation at Claremont Graduate School) (hereinafter "Cuddihy"). Cuddihy's thesis has been called "one of the most exhaustive analyses of the original meaning of the Fourth Amendment ever undertaken." *Vernonia School District 47J v. Acton*, 515 U.S. 646, 669 (1995) (O'Connor, J., dissenting).

would subject "houses, those castles considered sacred by English law . . . to the insolence and oppression of office. . . ."[10]

This Court has also expressed "no doubt" that William Pitt's address before the House of Commons in 1766 "echoed and re-echoed throughout the colonies."

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; but the King of England cannot enter – all his force dares not cross the threshold of the ruined tenement!

Payton, 445 U.S. at 601 n.54 (quotation omitted).

This respect for the sanctity of the home made it unlawful for government officials to break into a home in furtherance of a private purpose. In *Semayne's Case*, the King's Bench held that it was unlawful for a sheriff to break into a house at the suit of a common person because

> thence would follow great inconvenience that men as well in the night as in the day should have their houses (which are their castles) broke, by colour whereof great damage and mischief might ensue; for by colour thereof, on any feigned suit, the house of any man at any time might be broke when the defendant might be

---

[10] *To the People of Maryland* 2 (1786), *quoted in* Cuddihy at 1546.

> arrested elsewhere, and so men would not be in safety or quiet in their own houses.

Semayne v. Gresham, 5 Co. Rep. 91a, 92b, 77 Eng. Rep. 194, 198 (K.B. 1604) (footnotes omitted); *see also* 4 Blackstone at 223 (1769) (breaking into a home was prohibited in civil cases, but allowed in criminal cases because in such cases "the public safety supersede[d] the private").

Similarly, James Otis remonstrated against writs of assistance for not being directed solely to authorized officers.[11] Otis complained that the writs were directed "to every subject in the king's dominions" so that "every one with [a] writ may be a tyrant." 2 *Legal Papers of John Adams* at 142. He complained that not only deputies, "but even their menial servants are allowed to lord it over us." *Id.* Otis described the oppression that would result if writs could be issued at the behest of ordinary citizens:

> What a scene does this open! Every man prompted by revenge, ill humour or wantonness to inspect the inside of his neighbor's house, may get a writ of assistance.

Id. at 143.

Opposition to unwelcome intrusions into the home, like those described by Otis, "sprang from a popular

---

[11] This Court has characterized Otis's speech as "perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. 'Then and there,' said John Adams, 'then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.' " *Boyd*, 116 U.S. at 625.

opposition to the surveillance and divulgement that [such] intrusion[s] made possible." Cuddihy, at 1546. Those who adopted the Fourth Amendment were concerned about the divulgement of their private affairs to the public – a concern that would have made intolerable the unwelcome presence of people whose sole purpose in being there was to record and broadcast those affairs to a vast audience. This concern can be seen in the major English cases that inspired the Fourth Amendment.[12]

In the famous case of *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763), the attorney for John Wilkes argued that nothing could make up for "the promulgation of our most private concerns, affairs of the most secret personal nature" occasioned by the general search of his home. 98 Eng. Rep. at 490. It was "not proper," he asserted, that Wilkes' papers "be exposed to every eye." *Id.* at 490. Increased damages were sought due to the fact that Wilkes' papers were examined by "very improper persons to examine his private concerns." *Id.* The jury returned a verdict for 1,000 pounds.

In *Beardmore v. Carrington*, 95 Eng. Rep. 790 (C.P. 1764), Beardmore, the victim of a search conducted under a general warrant, charged that his "secret and private affairs" were "made public." 95 Eng. Rep. at 790. By so charging, Beardmore challenged outright the invasion of his privacy, not just the techniques that accomplished that

---

[12] *See* Akhil Reed Amar, *The Constitution and Criminal Procedure: First Principles* 13 & n.65 (1997) (identifying *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763); *Beardmore v. Carrington*, 95 Eng. Rep. 790 (C.P. 1764); and *Entick v. Carrington*, 19 How. St. Tr. 1029 (K.B. 1765), as three of six such cases).

invasion. As in *Wilkes*, the jury returned a verdict for 1,000 pounds.

In *Entick v. Carrington*, 19 How. St. Tr. 1029 (K.B. 1765), Lord Camden sustained a trespass verdict in favor of the victim of a general warrant. He famously declared that "if this point should be determined in favor of the jurisdiction, the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger." 19 How. St. Tr. at 1063.

These concerns about "promulgat[ing]," "throw[ing] open," and "ma[king] public" information to "a messenger" and "very improper persons" are of the same character as the Wilsons' concerns here. They show a degree of respect for the privacy of persons and inviolability of their property that would not have tolerated a government-led media intrusion into the home. Such an intrusion would have been unlawful at common law and constituted an "unreasonable search" at the time of the Fourth Amendment's adoption.

C. There Is No Justification For Respondents' Invitation To The Media In This Case

What is apparent from this brief historical discussion is that the chief concern of those who adopted the Fourth Amendment was directed towards unjustified intrusions into the home. It was against the background of a history of lawless entry into a man's home under the guise of authority that the Fourth Amendment was adopted. The right of the people "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" entailed "the right to shut the door on officials

of the state unless their entry is under proper authority." *Frank v. Maryland*, 359 U.S. 360, 365 (1959). It is for this reason that the Court has recognized as "belaboring the obvious" that "private residences are places in which the individual normally expects privacy free of governmental intrusion *not authorized by a warrant*." *United States v. Karo*, 468 U.S. 705, 714 (1984) (emphasis added).

1. The Warrant Did Not Authorize Media Entry Into The Wilson Home

The news media search of the Wilson home was not authorized by a warrant. As this Court has said "time and again," intrusions that occur "outside the judicial process, without approval by judge or magistrate" are "per se unreasonable under the Fourth Amendment." *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993) (quotations and citations omitted). "The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised." *United States v. United States District Court*, 407 U.S. at 317. Respondents had ample opportunity to obtain judicial guidance about the propriety of facilitating an independent news media search, and their failure to do so was not excused by "one of the carefully delineated exceptions" to the warrant requirement. *Dickerson*, 508 U.S. at 372.[13]

---

[13] This is not to say that if a warrant had authorized the media's presence the search would have been constitutional. The words of the Fourth Amendment forbid all unreasonable searches and seizures, including those conducted under the authority of a warrant. *See Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931) ("[The first clause of the Fourth

An appreciation of the unique position occupied by the home explains the Court's consistent application of the accepted rule that "a search of private houses is presumptively unreasonable if conducted without a warrant." *See v. City of Seattle*, 387 U.S. 541, 543 (1967). Because of the substantial privacy invasion inevitably occasioned by a search of the home, it is necessary to insist that the justification for the intrusion be strong – *i.e.*, that there is probable cause to believe that the item to be seized will be found in the area to be searched – and that the search be carefully circumscribed to the particular area described and the places in that particular area where the particular items identified could be located. It is also necessary to insist that the probable cause and particularity determinations be made in advance by a neutral and detached magistrate. This ensures that unjustified searches and seizures will not occur and that the scope of the officers' discretion is strictly limited to those actions related to accomplishing the purpose of the warrant. As the Court has said, "The proceeding by search warrant is a drastic one, and must be circumscribed so as to prevent unauthorized invasions of the sanctity of a man's home and the privacies of life." *Berger v. New York*, 388 U.S. 41, 58 (1967) (citations and quotations omitted); *see also Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971) (plurality opinion) ("[A]ny intrusion in

---

Amendment] is general and forbids every search that is unreasonable"). The existence of warrant authority might have had an effect on respondents' entitlement to qualified immunity, but it could not have made this search "reasonable."

the way of search or seizure is an evil, so that no intrusion at all is justified without a careful prior determination of necessity. . . . [T]hose searches deemed necessary should be as limited as possible.")

With this in mind, it must be remembered that respondents only possessed arrest warrants that permitted "duly authorized peace officers" to "take Dominic Jerome Wilson" to the Circuit Court for Montgomery County. J.A. 34-39. The Federal Rule of Criminal Procedure that governed their conduct instructed respondents how and by whom arrest warrants "shall be executed": "by a marshal or by some other officer authorized by law" and "by the arrest of the defendant." Fed. R. Crim. P. 4(d)(1) and (3). The outer boundaries of the authority that was conferred on respondents gave them the discretion to do whatever they reasonably felt needed to be done to apprehend Dominic Jerome Wilson. Respondents simply had no authority to do things that bore no relationship to achieving that objective, and bringing the media inside the Wilson home bore no relationship whatsoever to achieving that objective.

The actions of a law enforcement official executing a warrant, in order to be reasonable, must at a minimum be related to achieving the lawful purpose that justifies its existence. This Fourth Amendment principle has well-established common law pedigree. At common law, a privilege to enter the land of another protected the intruder only insofar as his actions were taken in furtherance of the purpose for which the privilege was given. In executing a lawful warrant, an official was protected from individual liability only so long as he remained within the bounds of the authority conferred

upon him or, as Blackstone put it, only so long as he "executes the same ministerially." 4 Blackstone at 288.

Consistent with this long-established common law tradition, "the Fourth Amendment confines an officer executing a search warrant strictly within the bounds set by the warrant." *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 394 n.7 (1971). If this were not so, the express terms of a warrant would become meaningless and the purpose of the Warrant clause frustrated. As Professor Telford Taylor has observed, those who adopted the Fourth Amendment were concerned about overreaching warrants. They viewed a warrant "as an authority for unreasonable and oppressive searches, and sought to confine its issuance *and execution* in line with the stringent requirements applicable to common-law warrants for stolen goods." Telford Taylor, *Two Studies in Constitutional Interpretation* 41 (1969) (emphasis added). Accordingly, a meticulous search for two canceled checks "could not be considered reasonable where agents are seeking a stolen automobile or an illegal still." *Harris v. United States*, 331 U.S. 145, 152 (1947). An officer cannot perform a protective sweep "any longer than it takes to complete the arrest and depart the premises." *Maryland v. Buie*, 494 U.S. 325, 335-36 (1990).

In *Terry v. Ohio*, 392 U.S. 1 (1968), the Court said that "[t]he scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." 392 U.S. at 19 (quoting *Warden v. Hayden*, 387 U.S. 294, 310 (1967) (Fortas, J., concurring)). And, in *Maryland v. Garrison*, 480 U.S. 79 (1987), the Court said that "the purposes justifying a police search strictly limit the permissible extent of the search." 480 U.S. at 87. More

recently, *Horton v. California*, 496 U.S. 128 (1990), provided that "[i]f the scope of the search exceeds that permitted by the terms of a validly issued warrant or the character of the relevant exception from the warrant requirement, the subsequent seizure is unconstitutional without more." 496 U.S. at 140.

Along these same lines, the Court has said that a warrantless search must be "strictly circumscribed by the exigencies which justify its initiation," *Mincey v. Arizona*, 437 U.S. 385, 393 (1978); *Terry*, 392 U.S. at 26, and limited to the extent "commensurate with the rationale that excepts the search from the warrant requirement." *Cupp v. Murphy*, 412 U.S. 291, 295 (1973). In *Arizona v. Hicks*, 480 U.S. 321 (1987), the Court found that picking up a piece of stereo equipment in plain view to examine hidden serial numbers was an unlawful search because it was "unrelated to the objectives of the authorized intrusion." 480 U.S. at 325.

Bringing the media into the Wilson home was "unrelated to the objectives of the authorized intrusion." It was not authorized by the warrant. This Court has consistently and repeatedly admonished law enforcement officials to tailor their conduct to that which is at least related to furthering the purpose that justifies their intrusion in the first place. Since respondents did not invite the media into the Wilson home to assist in the purpose that privileged respondents to be there – arresting Dominic Wilson – the invitation was unreasonable *per se* under well-established Fourth Amendment principles.

2. No Law Enforcement Interests Justified Respondents' Invitation To The Media

Respondents do not attempt to argue that the media's presence was in furtherance of the purpose that entitled them to be in the Wilson home. Indeed, they have conceded otherwise, as previously noted:

> Q. Well, the press – on April 16, 1992, they were not assisting you as law enforcement officers in any way, were they?
>
> A. No.

J.A. 119 (Collins depo. at 157). Thus, any "legitimate law enforcement interests" that *might* have been served by having the press along are irrelevant. Given respondents' admission that there was in fact no law enforcement purpose served by the presence of the media in this case, there was no conceivable authority to bring them into the Wilson home.

A plurality of Fourth Circuit judges, however, conjured up two examples of "legitimate law enforcement interests" that a "reasonable officer" might have believed were served by bringing the press along. The examples provided by the plurality are so distant from the purposes that permitted the officers to be inside the Wilson home that, if accepted, they would effectively eliminate any restrictions imposed by a warrant's limited scope, and thus wholly ignore this Court's established prohibition on general warrants. Under the plurality's standard, the carefully limited scope of a warrant becomes meaningless in the face of an officer's – or a court's – *post hoc* speculation that some nebulous law enforcement purpose

would be served by expanding a search beyond the warrant's scope. Such a purpose could always be hypothesized, as the plurality's opinion illustrates.

The plurality first speculated that the officers might have believed that a suspect would behave better knowing that his actions were being recorded. The easy response to this point is that if a reasonable officer actually believed that stillshot photography was necessary to deter misconduct, then the officers themselves might have taken photographs. Having the press, as opposed to the police, take the pictures intensifies the privacy invasion without corresponding gain in advancing a law enforcement purpose. In any event, as the dissent correctly observed, it is "absurd" to suggest that a reasonable officer could have concluded that the media's presence afforded such assistance.[14]

The second "legitimate law enforcement purpose" hypothesized by the plurality was that the media's presence might have been thought to contribute to accurate

---

[14] The dissent further explained:

> The reporters might also have helped by carrying the warrant while the officers handcuffed suspects, or by holding the door open for an officer while he was carrying contraband; but to uphold the police actions because of the potential for fortuitous assistance, despite clearly not being designed to serve law enforcement, would make a mockery of the rule that an officer's actions are limited to the scope authorized by the warrant. The exceptions to this strict limitation permit only those actions reasonably necessary to accomplish the purpose of the warrant.

Pet. App. 33a-34a (citations omitted).

reporting of law enforcement activities, which in turn helps deter crime and police misconduct. As important as that media function may be, in this context it is an exception that would effectively swallow the Court's traditional rules regarding the sanctity of the home and the importance of the warrant requirement. The watchdog argument could be used to justify media presence at any government activity no matter how intrusive it is; there is always the "possibility" that a government official will engage in "improper conduct." More realistically, however, this theory is fanciful, for the police simply will not invite the media inside when they plan to misbehave.[15]

Furthermore, if deterrence of criminal misconduct were the measure of things, then the value of the media participation would be linked to how intrusive the police conduct is. The more humiliating the better in terms of deterrence value.[16]

---

[15] Further diminishing respondents' watchdog argument is the fact that in many ride-along situations the press agrees to a news embargo before being allowed to accompany law enforcement officials. Deputy U.S. Marshals are advised that "to avoid nasty surprises, make sure both the reporter and his or her editor agree to the embargo. If they don't or won't, consider inviting another media organization." J.A. 8.

[16] The dissent provides an illustration of the problem:

> If, for example, the police officers had a warrant to perform a body cavity search on Mrs. Wilson, the majority implies that they could have believed the warrant authorized them to allow members of the public to watch. . . . Such a search would be patently unreasonable. . . . In today's case the majority finds that it was not clearly unreasonable for a police officer to force at gunpoint a citizen in his underwear to pose for a camera, potentially to be exhibited to the entire viewing readership of the *Washington Post*. This, too, was patently unreasonable.

Pet. App. 41a-42a.

Finally, neither of the "legitimate purposes" that the plurality identified can logically be limited to the media. They could each just as well justify bringing anyone and everyone inside the home with police – a high school civics class, the City Council, the suspect's neighbors, any passerby who is on the street as the police arrive.

In any event, as we have shown, the Wilsons' had an absolute right as old as the common law to keep all strangers out of their house who were not privileged to be there. The media were not privileged to be there and respondents had no authority to bring them there, no matter what government interests might have been furthered by their presence. Respondents' conduct was unlawful the day the Fourth Amendment was adopted and remains unlawful "even if a later, less virtuous age should become accustomed to considering all sorts of intrusion 'reasonable.' " *Dickerson*, 508 U.S. at 380 (Scalia, J., concurring).

II. RESPONDENTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY

This is not a case where liability is premised on a new constitutional rule or an officer's failure to predict a court's after-the-fact judgment regarding a vague constitutional standard. A clearly established rule required that a law enforcement official's actions in searching a home,

at a minimum, be related to accomplishing the purpose that justified his being there in the first place. Unless exigent circumstances exist, the purpose of an intrusion typically finds its expression in the terms of a warrant, as it did here. Since the media's presence in the Wilson home bore no relationship to accomplishing the purpose of the warrant respondents could not reasonably have believed that they were authorized to bring them there.

A. The Fourth Circuit's Qualified Immunity Standard Was Overly Lenient

In effect, the Fourth Circuit held that qualified immunity must be granted unless it or this Court had previously issued a decision establishing unconstitutionality in a factually indistinguishable case. The Fourth Circuit relied on an overly generous interpretation of qualified immunity to find petitioners' rights insufficiently established. The court held that

> even if we were to agree with the Wilsons that in 1992 it was clearly established that the Fourth Amendment was violated if officers permitted third parties who were not expressly authorized by the warrant and who were not assisting reasonable law enforcement efforts related to the execution of the warrant to accompany them into a residence, we could not conclude that it was clearly established that the conduct in which these officers engaged manifestly fell within the ambit of that rule.

Pet. App. 10a. In other words, the court of appeals held that this Court's constitutional rule may have been clear as a general matter, but it had yet to be elaborated with

the requisite factual specificity to satisfy the Fourth Circuit's qualified immunity standard, which would require cases specifically establishing that "permitting reporters to observe the events surrounding the execution of an arrest warrant" is unconstitutional.

The Fourth Circuit's qualified immunity standard requires a level of specificity in the articulation of a constitutional right that this Court has already rejected. *Anderson v. Creighton*, 483 U.S. 635 (1987), addressed the question of how particularly defined a right must be in order for it to be "clearly established": "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has been previously held unlawful, but it is to say that in light of preexisting authority the unlawfulness must be apparent." *Id.* at 640 (citations omitted). In *United States v. Lanier*, 117 S. Ct. 1219 (1997), the Court directly addressed the question whether a right that has been defined in general terms, but applied only in factually distinguishable circumstances, can nonetheless clearly establish the law. The Court held that it can.[17] *Lanier*

---

[17] *Lanier* arose in the context of a criminal prosecution under 18 U.S.C. § 242, which establishes criminal liability for willful violations of constitutional rights. In defining the level of specificity required to fulfill the due process requirement of "fair warning," *Lanier* expressly equated the Section 242 standard with the "clearly established" standard under qualified immunity law: "[T]he qualified immunity test is simply the adaptation of the fair warning standard to give officials . . . the same protection from civil liability and its

expressly rejected the Sixth Circuit's standard in that case, which was essentially identical to the court of appeals' standard in this case.

Lanier explained that "notable factual distinctions between the precedents relied on" and the cases before the court are acceptable "so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *Id.* at 1227. This Court added that "general statements of the law are not inherently incapable of giving fair and clear warning," and "a general constitutional rule already defined in the decisional law may apply with obvious clarity to the specific conduct in question." *Id.* The Court condemned the court of appeals' demand for factually analogous precedents, stating that "all that can usefully be said" is that liability may be imposed only if "in light of clearly established law the unlawfulness is apparent." *Id.* at 1228 (quoting *Anderson*, 483 U.S. at 640).

B. In Light Of Clearly Established Law, The Unlawfulness Of Respondents' Conduct Was Apparent

The Fourth Circuit should have considered the underlying Fourth Amendment issue first.[18] If they had

---

consequences that individuals have traditionally possessed in the face of vague statutes." 117 S. Ct. at 1227.

[18] Last Term, the Court stated that "the better approach is to determine the right before determining whether it was previously established with clarity." *County of Sacramento v. Lewis*, 118 S. Ct. 1708, 1714 n.5 (1998). *County of Sacramento* was issued subsequent to the Fourth Circuit's opinion.

done so, it would have become apparent that fundamental principles require a finding that the conduct here was unconstitutional. For the same reasons, it should have been apparent to respondents that there was no justification for their conduct.

The principles recounted in Part I of this brief were well-settled prior to April 1992 and all apply with obvious clarity to respondents' conduct. From the early days of the common law to the present a government official authorized to intrude into a private residence was only authorized to take actions reasonably related to accomplishing the purpose that justified his intrusion. The media's presence in and search of the Wilson home and photographing of the Wilsons in embarrassing states of undress bore no relationship to accomplishing respondents' purpose in being there.

The Second Circuit came to this very conclusion in *Ayeni v. Mottola*, 35 F.3d 680, *cert. denied*, 514 U.S. 1062 (1995):

> It has long been established that the objectives of the Fourth Amendment are to preserve the right to privacy to the maximum extent consistent with reasonable exercise of law enforcement duties and that, in the normal situations where warrants are required, law enforcement officers' invasion of the privacy of a home must be grounded on either the express terms of a warrant or the implied authority to take reasonable law enforcement actions related to the execution of the warrant.

35 F.3d at 686. *Ayeni* also found that the unreasonableness of bringing the media into a home was

> heightened by the fact that, not only was it wholly lacking in justification based upon the legitimate needs of law enforcement conduct, but it was calculated to inflict injury on the very value that the Fourth Amendment seeks to protect – the right to privacy.

Id.

The apparent unlawfulness of respondents' conduct is heightened in this case by the humiliating circumstances under which the Wilsons were detained and photographed. This Court has warned that "responsible officials, including judicial officials, must take care to assure that [searches and seizures that may reveal innocuous, private information] are conducted in a manner that minimizes unwarranted intrusions upon privacy." *Andresen v. Maryland*, 427 U.S. 463, 482 n.11 (1976). Respondents ignored this warning. Their conduct could hardly have been more needlessly destructive of privacy.

Indeed, even in the context of a government facility, a plurality of justices in *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978) (plurality opinion), expressed the view that "[i]nmates in jails, prisons, or mental institutions retain certain fundamental rights of privacy; they are not like animals in a zoo to be filmed and photographed at will by the public or by media reporters, however 'educational' the process may be for others." 438 U.S. at 5 n.2. Two published opinions predating the raid on the Wilson home found that videotaping prisoners against their will for no legitimate penological purpose was unconstitutional. *See Best v. District of Columbia*, 743 F. Supp. 44, 48 (D.D.C. 1990); *Smith v. Fairman*, 98 F.R.D. 445, 450 (C.D. Ill. 1982). This judicial acknowledgment of the privacy

rights of prisoners underscores the obviousness of such a right for people in their homes.

Published federal authority as of April 1992 only condoned third-party involvement in the execution of warrants inside private homes when those parties were acting "in aid of" law enforcement. *See, e.g., United States v. Clouston*, 623 F.2d 485, 486-87 (6th Cir. 1980); *United States v. Schwimmer*, 692 F. Supp. 119, 126-27 (E.D.N.Y. 1988). A federal statute, moreover, provides that "[a] search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, *but by no other person, except in aid of the officer on his requiring it*, he being present and acting in its execution." 18 U.S.C. § 3105 (emphasis added).[19] Federal law respecting the execution of arrest warrants does not even allow for the participation of individuals not authorized to execute the warrant. *See* Fed. R. Crim. P. 4(d)(1) ("The warrant shall be executed by a marshal or by some other officer authorized by law.") Thus, it would have been clear to a reasonable law enforcement official that while it is permissible for law enforcement officials to invite third parties into private dwellings when their assistance is needed, it is impermissible otherwise.

This lesson was not lost on the Sixth Circuit in *Bills v. Aseltine*, 958 F.2d 697 (6th Cir. 1992), the only federal Court of Appeals decision in existence prior to April 1992 that addressed the propriety of an intrusion by a private

---

[19] The Second Circuit looked to 18 U.S.C. § 3105 as a "basis for giving content to the [Fourth] Amendment's generalized standard of reasonableness." *Ayeni*, 35 F.3d at 687.

party *not* acting in aid of the law enforcement purpose that entitled law enforcement officials themselves to conduct a search. *Bills* recognized that:

> Police may constitutionally call upon private citizens to assist them, and where assistance is rendered in aid of a warrant, *and not for some other purpose*, the bounds of reasonableness have not been overstepped.

958 F.2d at 706 (emphasis added).

In *Bills*, law enforcement officials executing a search warrant for a generator invited a security guard from General Motors to accompany them to identify stolen General Motors property not mentioned in the warrant. The court found that:

> Officers in 'unquestioned command' of a dwelling may violate that trust and exceed the scope of the authority implicitly granted them by their warrant when they permit unauthorized invasions of privacy by third parties *who have no connection to the search warrant or the officers' purposes for being on the premises.*

958 F.2d at 704 (emphasis added). The Sixth Circuit reversed the trial court's grant of summary judgment for the officers because of genuine issues of material fact regarding the reasonableness of the officers' conduct.

C. Respondents' Conduct Was Contrary To Reasonable Law Enforcement Practices

Even before *Bills*, the unlawfulness of respondents' conduct was apparent to Raymond Kight, the Sheriff of Montgomery County:

> Q. Has it been your view since you've been the sheriff of Montgomery County that it's been a violation of the – it would be a violation of the constitutional rights of a private resident to have a deputy sheriff bring civilians –
>
> A. Yes.
>
> Q. – into their home?
>
> A. Yes. Now, that – that would be a person on the ride-along program. If you brought in a witness to a crime to identify someone, that may be a different story.

C.A.J.A. 149 (Kight Depo. at 15).

Consistent with that understanding, Sheriff Kight prohibited his deputies – three of whom are respondents here – from engaging in such conduct: "We would never let a civilian into a home. . . . That's just not allowed." C.A.J.A. 147 (Kight Depo. at 10).

Sheriff Kight's policy conforms with what was considered reasonable by the law enforcement community. According to the *Model Rules for Law Enforcement Officers*, a 1974 publication prepared by the Texas Criminal Justice Council in conjunction with the International Association of Chiefs of Police, civilian participation in the execution of a warrant was prohibited unless absolutely necessary:

> No persons other than peace officers, police legal advisors, and members of the district attorney's office shall be permitted to accompany officers in the execution of the warrant, unless absolutely necessary.

Texas Criminal Justice Council, *Model Rules for Law Enforcement Officers: A Manual on Police Discretion* § 4.02

(1974). The comment to this section provided: "Section 4.02 prohibits non-police personnel, such as press and media representatives from accompanying officers." *Id.* at 257. The comment further adds that, unlike the media, "technical experts," such as a locksmith, "have a legitimate reason to go along." *Id.* at 258.

D. Case Law Addressing Police/Media Home Intrusions Prior To April 1992 Does Not Make The Unlawfulness Of Respondents' Conduct Any Less Apparent

We are aware of three cases predating April 16, 1992 involving police/media intrusions that failed to find a Fourth Amendment violation.[20] Two of the cases are unpublished federal district court decisions, *Moncrief v. Hanton*, 10 Media L. Rptr. (BNA) 1620 (N.D. Ohio Jan. 6, 1984) and *Higbee v. Times-Advocate*, 5 Media L. Rptr. (BNA) 2372 (S.D. Cal. Jan. 9, 1980), and the other is a state intermediate appellate court decision, *Prahl v. Brosamle*, 295 N.W.2d 768, 782 (Wis. 1980).

---

[20] We are also aware of two cases where juries returned verdicts against police officers for unreasonable searches due to the presence of the media during the search. *See* Rogers & Callender, *Jurors Award Couple $25,000 in Privacy Lawsuit*, The Capital Times (Madison, Wis.), Jan. 10, 1987, at 3 (reporting that a state court jury found detectives liable "as co-trespassers and that their search was unreasonable in light of the presence of the TV crew"); Umhoefer, *Ripon Police, Newspaper Lose Lawsuit Over Search of Home*, Milwaukee J., Nov. 26, 1986, at 6B (reporting that a federal court jury found that the search constituted "an unreasonable invasion of privacy under Wisconsin law, and a violation of the family's constitutional rights.")

The *Higbee* decision does not mention the Fourth Amendment. It simply asserts that "[t]he right to privacy is only deemed worthy of Constitutional protection in certain circumstances, usually involving gross abuses. . . . " 5 Media L. Rptr. at 2372. (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)). *Moncrief* is no different. It does not cite to a single Fourth Amendment search and seizure case. Instead, it cites to cases involving abortion, contraceptives, and marriage and concludes that the plaintiff's claim does not fall within the federally protected "zone of privacy." 10 Med. L. Rptr. at 1622.

The *Prahl* decision, unlike the other two cases, at least uses the words "reasonable search and seizure." Yet, it too does not bother to cite to a single case involving a search of property, let alone the home. It relies on a case involving male participation in female body searches, *Doe v. Duter*, 407 F. Supp. 922 (W.D. Wis. 1976), and then concludes that the filming of Prahl's residence did not rise to the same level of offensiveness.

These are not Fourth Amendment search and seizure cases. These cases sound in penumbral privacy rights or substantive due process. This Court has since explicitly rejected resort to a substantive due process standard in analyzing claims that law enforcement officials have used excessive force in the course of an arrest. *Graham v. Connor*, 490 U.S. 386 (1989). *Graham* found that "[b]ecause the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive government conduct, that Amendment, not the more generalized notion of 'substantive due process,'

must be the guide for analyzing these claims." 490 U.S. at 395. These cases cannot be squared with *Graham*.[21]

In any event, none of the principles or cases discussed in this brief are even mentioned in those decisions. Their existence cannot make any less clear what has been recounted above or any less apparent the wrongfulness of respondents' conduct. If the balance struck in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), between vindication of constitutional guarantees and the protection of government officials is to be preserved, then such cases can be given no greater weight than if they had gone the other way. That is, just as those cases could not have clearly established the law for qualified immunity purposes, neither can they establish an official's entitlement to qualified immunity. *See Jones v. Coonce*, 7 F.3d 1359, 1362 (8th Cir. 1993) (finding right clearly established despite unpublished district court case not recognizing the right). If the law were otherwise, a single mistaken judge in a remote location could effectively establish immunity for law enforcement officials across the land.

E. The United States Marshals Service Media Ride-Along "Policy" Is Irrelevant

Respondents claimed in their Brief in Opposition to the Petition that "[t]he most important fact about this

---

[21] *See also Soldal v. Cook County*, 506 U.S. 56 (1992) (finding that the Fourth Amendment, not just the Due Process Clauses of the Fifth and Fourteenth Amendments, protects against seizures of property where no privacy or liberty interests are at stake).

case . . . is that respondents were following the terms of a binding and apparently valid policy issued by the U.S. Department of Justice," Pet. Opp'n at 4, and "simply were not at liberty to depart from that policy or to refuse to implement its terms." Pet. Opp'n at 7. This claim is precisely contrary to Respondents' own sworn testimony:

- "I don't know of any authority anywhere about press." C.A.J.A. 132. (Perkins Depo. at 59.)
- "I'm not familiar with the policy with the press." C.A.J.A. 119. (Collins Depo. at 157.)
- Q. "Did you inquire or was there any discussion with Harry Layne, when he instructed you to take the media along with you, whether or not the media would be allowed to go into private residences?"
- A. "There was no instruction." C.A.J.A. 131 (Perkins Depo. at 54.)

The uncontroverted evidence in the record establishes that Respondents were never aware of the "policy" that they now claim to have been following. In addition, there is no evidence in the record that anybody ever instructed or authorized respondents – either pursuant to a policy or otherwise – to take the media with them into private dwellings without consent.[22] In fact, the Memorandum of Understanding that outlined the mission of

---

[22] Again, the record evidence indicates just the opposite. Three of the six Respondents in this case are Montgomery County deputy sheriffs. The Sheriff of Montgomery County, Raymond Kight, testified under oath that it was the policy of the Montgomery County Sheriff's Department never to let civilians who were not providing law enforcement assistance into private

"Operation Gunsmoke" prohibited respondents from taking the press with them at all: "It is agreed that no mention will be made to the press about 'Operation Gunsmoke' until a joint press statement can be prepared at the culmination of the operation." J.A. 20.

Although Respondents' sworn testimony and the Memorandum of Understanding are fatal enough to respondents' claim that they were "just following a policy," that claim is also undermined by the actual language of the document that they call a "Justice Department policy." To begin with, by its very terms, the document is not a "policy." It refers to itself simply as a "booklet" describing "considerations that are important in nearly every ride-along." J.A. 4.[23] The final paragraph of the booklet advises marshals to call the "Office of Congressional and Public Affairs" with any media ride-along questions not addressed and concludes: "We will make every effort to help you plan for a most successful ride-along." J.A. 14. This document, trumpeted as a "binding

---

homes: "We would never let a civilian into a home or anywhere else where we have a person that – that's in custody. . . . That's just not allowed." C.A.J.A. 147. Sheriff Kight also testified that his deputies knew better than to allow civilians participating in ride-alongs inside people's homes: "My deputies knew not to do that. And I would believe that the homeowner, if that happened, you know, would have some measure of grievance that that occurred." C.A.J.A. 148.

[23] A complete copy of the booklet is included in the Joint Appendix here. Only every other page of the booklet was included in the Joint Appendix before the court of appeals and we reproduced it in that form in Petitioner's Reply in Support of the Petition for Writ of Certiorari. The booklet, however, was placed in the record in its entirety before the district court.

Justice Department policy" that Respondents "simply were not at liberty" to disobey, is actually nothing more than a media relations guide prepared by the Office of Congressional and Public Affairs.

The existence of this media ride-along booklet, moreover, is really beside the point. The Wilsons have no quarrel with "media ride-alongs" or with an informational booklet providing suggestions on how to conduct them. The Wilsons' sole complaint – and the sole issue raised by the questions presented here – is with officers bringing the media inside private residences without the occupants' consent. The media ride-along booklet nowhere authorizes or instructs deputy marshals to do this. The only language in the booklet upon which respondents relied in their Brief in Opposition to the Petition to justify their conduct in this case is this sentence: "If the arrest is planned to take place inside a house or building, agree ahead of time on when the camera can enter and who will give the signal." J.A. 7. This lone reference hardly amounts to a binding order to respondents to take the press with them into a home without the occupants' consent and is perfectly consistent with the Wilsons' view that no members of the media should have been allowed to enter their home until the media had received "the signal" that the Wilsons had indeed provided that consent.

Respondents also neglected to point out language in the booklet that undercuts their argument that they were somehow authorized or instructed to do what they did here. For example, the booklet describes as "essential" the establishment of ground rules and advises deputy marshals to convey those ground rules to reporters. Two

ground rules that the booklet specifically identifies are those addressing "what can be covered with cameras and when" and "any privacy restrictions that may be encountered." J.A. 7.

Notwithstanding respondents' efforts to create the contrary impression, there was no tension between the exercise of their duties and their obligation to comply with the Constitution.

III. CONCLUSION

Respondents violated the Wilsons' Fourth Amendment rights by allowing members of the news media to accompany them and to observe and record their execution of a warrant inside the Wilson home without the Wilsons' consent. They are not entitled to qualified immunity because clearly established Fourth Amendment principles would have made the unlawfulness of their conduct apparent to a reasonable officer. Accordingly, the

judgment of the court of appeals should be reversed and the case remanded for trial.

Respectfully submitted,

Of Counsel:

STEVEN R. SHAPIRO
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500

ARTHUR B. SPITZER
American Civil Liberties Union of the National Capital Area
1400 20th Street, N.W.
Washington, D.C. 20036
(202) 457-0800

DWIGHT H. SULLIVAN
American Civil Liberties Union of Maryland
2219 St. Paul Street
Baltimore, MD 21218
(410) 889-8555

RICHARD K. WILLARD
Counsel of Record
DAVID H. COBURN
JAMES S. FELT
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000

RICHARD SELIGMAN
601 Indiana Avenue
Suite 910
Washington, D.C. 20004
(202) 745-7800

Attorneys for Petitioners